STATE OF MICHIGAN

COURT OF APPEALS

YVONNE S. HODGES, Legal Guardian of MARCUS DAVIS, a Legally Incapacitated Person,

Plaintiff-Appellant,

v

ECS PARTNERSHIP,

Defendant-Appellee

and

MICHAEL CANON,

Defendant.

UNPUBLISHED
January 8, 2009

No. 280630
Wayne Circuit Court
LC No. 06-620752-NO

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff Yvonne S. Hodges appeals as of right from the trial court's order granting summary disposition to defendant ECS Partnership pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's complaint, filed on behalf of Marcus Davis, a mentally incapacitated adult, arose from an incident at a McDonald's restaurant that was owned and operated by defendant ECS Partnership. In this incident, an employee, Michael Canon, allegedly assaulted Davis, who was at the McDonald's restaurant as a customer. Plaintiff now appeals the dismissal by summary disposition of her negligent supervision/retention claim (but not the dismissal of her claims for negligent hiring or vicarious liability for the criminal assault). Plaintiff argues that defendant owed a duty to Davis once Canon made verbal threats to assault Davis, thus creating a risk of imminent and foreseeable harm to Davis, and that defendant was negligent in the performance of that duty.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim and may be granted if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). A genuine issue of material fact exists when the record, giving the benefit of

reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC,* 469 Mich 177, 183; 665 NW2d 468 (2003).

Merchants have a duty to respond reasonably to situations occurring on their premises that pose a risk of imminent and foreseeable harm to identifiable invitees. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 398, 405; 566 NW2d 199 (1997). A premises owner's duty is limited to reasonably responding, by calling the police, to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees. *MacDonald v PKT, Inc*, 464 Mich 322, 345; 628 NW2d 33 (2001). In *Brown v Brown*, 478 Mich 545, 553; 739 NW2d 313 (2007), our Supreme Court considered whether an employee's criminal activity is foreseeable by his employer and whether the employer is liable for that criminal activity. The issue in *Brown* was whether an employer was negligent when it retained an employee it knew had made lewd remarks against the plaintiff and that employee later raped the plaintiff. The Court held that "where an employee has no prior criminal record or history of violent behavior indicating a propensity to rape, an employer is not liable solely on the basis of the employee's lewd comments for a rape perpetrated by that employee if those comments failed to convey an unmistakable, particularized threat of rape." *Brown, supra* at 547-548.

Evaluating the evidence in the present case in a light most favorable to plaintiff, this Court accepts as true plaintiff's claims that, while Davis waited for his food to be prepared at the McDonald's restaurant, Canon cursed at him with no provocation and, when Davis screamed out in response, told Davis to shut up "or I'll kick your ass." According to Davis's deposition testimony, he then alerted the supervisor who silenced Canon, but Canon soon attacked Davis without any provocation. There was also evidence that it was defendant's policy that, if an employee became loud with a customer, the employee was either moved to the back or sent home (in fact, a write up made after the incident indicated that Canon was initially told to go to the back of the store but was allowed to stay at his workstation after he gave assurances that his anger was under control). Davis testified that the supervisor attempted to pull Canon off of him and called the police at some point during the incident. Plaintiff did not dispute that Canon had no criminal record and no history of aggressive behavior before this incident.

This evidence does not raise a genuine issue of foreseeable harm to Davis, and therefore defendant owed no duty to Davis. First, the phrase uttered by Canon is frequently used to vent anger or as a warning to back off, rather than as an expression of an actual intent to fight. Defendant could not have anticipated that, in this situation, Canon would make good on his threat. In addition, Canon's comments were made just once and immediately before the assault, and there was no prior record of Canon committing assaultive or violent acts during his employment at the McDonald's restaurant. As such, Canon's threat was similar to the comments made by the employee in *Brown* that were lewd and tasteless but not "an inevitable prelude to rape" since they "did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim." *Brown, supra* at 555. Second, even if we were to find that defendant owed a duty to Davis, the supervisor was not negligent in the performance of that duty since he responded reasonably to the situation by calling the police. See *MacDonald, supra* at 345. In addition, when the unforeseeable attack did occur, the supervisor intervened on Davis's behalf.

We conclude that the trial court did not err by finding that the evidence raises no material issue regarding a duty defendant owed to Davis, or alternatively negligent performance of a duty, and therefore, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder